October 14, 1994

OPINION NO. 94-071

Steven J. Grossman, Executive Director
Ohio Water Development Authority
88 East Broad Street, Suite 1300
Columbus, Ohio 43215-3516

Dear Executive Director Grossman:

You have requested an opinion regarding the propriety of the Ohio Water Development Authority ("OWDA") providing certain specified financial assistance to private entities. By way of background, you state that

> [t]he OWDA is an agency and instrumentality and body corporate and politic in and of the State of Ohio (the "State") and is responsible for the protection and preservation of the State of Ohio's water resources and the prevention and abatement of pollution of its water sources. Upon creation of the OWDA in 1968, the State provided the OWDA's initial funding through the issuance of $100,000,000 of general obligation bonds (the "Original Bonds") pursuant to Article VIII, Section 2i of the Ohio Constitution.[1] The General Assembly appropriated the proceeds of those

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[1] Pursuant to Ohio Const. art. VIII, §2i, the General Assembly is authorized to issue tax-supported obligations for, *inter alia*,

> the acquisition, construction, reconstruction, or other improvement of, and provision of equipment for, buildings, structures, or other improvements, and necessary planning and engineering, for water pollution control and abatement, including those for sewage collection, treatment, or disposal, water management, including those for water distribution, collection, supply, storage, or impoundment, and stream flow control, and flood control....

The holders or owners of tax-supported obligations are given the right to have the excises and taxes levied by the General Assembly for the payment of the principal of and interest on such tax-supported obligations. Ohio Const. art. VIII, §2i.

Original Bonds to the OWDA for its use in accordance with Chapter 6121 of the Ohio Revised Code (together with Chapter 6123 of the Ohio Revised Code, which authorizes the OWDA to provide assistance with respect to solid waste facilities, the "Act"). All of the bonds of the State that funded the original appropriation to the OWDA have been paid and discharged.

When the OWDA was created in 1968, it used the original appropriation to make loans to local governments for drinking water and wastewater improvements. The OWDA then used that portfolio of loans to secure revenue bonds, used the proceeds of these revenue bonds to make more loans to local governments, and in turn used these loans to secure more revenue bonds. Over the years the OWDA has made more than $2.5 billion of loans to local governments.

In order to make the revenue bonds marketable on favorable terms, the OWDA allows for "coverage" by structuring the transactions in such a way that the debt service on the revenue bonds is less than the scheduled loan repayments on the loans which secure the revenue bonds. The coverage (generally 5%) has generated additional moneys in OWDA surplus funds that the OWDA can use for other programs. To date the OWDA has used the moneys in the surplus funds solely for governmental loans and grants.

Proposed Transactions

Increasingly, the OWDA is being asked to consider loan and grant projects that fall within the OWDA's statutory mandate, but which entail financial assistance either directly to private parties or to governmental bodies with the understanding that the proceeds of the loan or grant will be used to provide facilities with a significant private use. Examples of such requested projects are loans or subsidies for farmers who undertake to make improvements that decrease non-point source pollution of waterways, and loans or grants to proposed operators of innovative solid waste disposal systems for cities or solid waste management districts. The OWDA is eager to undertake such programs where it determines that its statutory mandate set forth in the Act is being served, but is constrained by the fact that moneys in the surplus funds arguably derive from the original appropriation of Original Bond proceeds to the OWDA. If the moneys in the surplus funds are deemed therefore "raised by taxation" based on that theory of their derivation, the proviso of Article VIII, Section 13 ... would not be met, resulting in a prohibited lending of the aid and credit of the State. (Footnote added.)

In light of this information, you wish to know the following:

1. Are the moneys the OWDA derives from loan repayments "raised by taxation" for purposes of Ohio Const. art. VIII, §13?

2. If the moneys the OWDA derives from loan repayments constitute "moneys raised by

> taxation," does the use of such moneys to make loans cause the moneys to be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted pursuant to Ohio Const. art. VIII, §13?

Ohio Const. art. VIII, §§4 and 13

As noted in your letter of request, the extension of the state's credit to, or in aid of, any individual, association, or corporation is generally forbidden by Ohio Const. art. VIII, §4. *Cf.* Ohio Const. art. VIII, §6 (prohibiting a county, city, town, or township from lending its aid and credit to private enterprises in language similar to that of Ohio Const. art. VIII, §4). However, Ohio Const. art. VIII, §13, which is an exception to the lending aid and credit prohibitions that appear in Ohio Const. art. VIII, §§4 and 6, provides, in relevant part, as follows:

> *To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste, it is hereby determined to be in the public interest and a proper public purpose for the state or* its political subdivisions, taxing districts, or public authorities, *its or their agencies or instrumentalities,* or corporations not for profit designated by any of them as such agencies or instrumentalities, *to acquire, construct, enlarge, improve, or equip,* and to sell, lease, exchange, or otherwise dispose of *property, structures, equipment, and facilities* within the State of Ohio for industry, commerce, distribution, and research, *to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities. Laws may be passed to carry into effect such purposes and* to authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, the state, or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, and *to authorize the making of guarantees and loans and the lending of aid and credit, which laws, bonds, obligations, loans, guarantees, and lending of aid and credit shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or of Article XII, Sections 6 and 11, of the Constitution, provided that moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under this section.* (Emphasis added.)

Thus, §13 of article VIII expressly states that the lending of aid and credit in accordance with the terms of that provision is not subject to the requirements, limitations, or prohibitions of any other section of article VIII, or of Ohio Const. art. XII, §§6 and 11, provided, however, that "moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under this section." *See* 1985 Op. Att'y Gen. No. 85-011; 1983 Op. Att'y Gen. No. 83-094. Therefore, within the limitations established by Ohio

Const. art. XIII, §13, laws may be passed to provide for state financial assistance in connection with the acquisition, construction, enlargement, improvement, or equipment of property, structures, equipment, and facilities within the state for industry, commerce, distribution, and research. *See generally State ex rel. Burton v. Greater Portsmouth Growth Corp.*, 7 Ohio St. 2d 34, 36-37, 218 N.E.2d 446, 449 (1966) (Ohio Const. art. VIII, §13 allows "the state and governmental subdivisions to give financial assistance to private industry or to other governmental units in order to create new employment within this state").

The Ohio Water Development Authority (OWDA) May Provide Financial Assistance to Governmental Agencies and Private Entities

Pursuant to the grant of authority set forth in Ohio Const. art. VIII, §13, the General Assembly has enacted R.C. 6121.03, R.C. 6123.03, and R.C. 6123.031.[2] These sections authorize OWDA to make loans and grants to governmental agencies for the acquisition or construction of waste water facilities, water management facilities, solid waste facilities, and energy resource development facilities by such governmental agencies. *Cf.* R.C. 6121.04(E) *and* R.C. 6123.04(C) (OWDA may make loans and grants to governmental agencies for the acquisition or construction of water development projects by any such governmental agency). R.C. 6121.03, R.C. 6123.03, and R.C. 6123.031 also authorize OWDA to make loans to persons[3] for the acquisition or construction of waste water facilities, water management facilities, solid waste facilities, and energy resource development facilities by such persons. *See also* R.C. 6123.032 (set forth in note two, *supra*); *cf.* R.C. 6121.044(A)(1) *and* R.C. 6123.041(A)(1) (OWDA may make loans for the acquisition or

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[2] In addition, the General Assembly has enacted R.C. 6123.032. *See* Am. Sub. S.B. 221, 120th Gen. A. (1994) (eff. Sept. 28, 1994). That section provides, in part:

> To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, or to control air, water, or thermal pollution, and pursuant to section 13, Article VIII, Ohio Constitution, the Ohio water development authority may exercise the powers set forth in this chapter for the purpose of providing financial assistance for the undertaking of any voluntary action and shall establish a fund for providing such assistance.

As used in R.C. 6123.032, "voluntary action" means a voluntary action, as defined in R.C. 3746.01(O), that is conducted under the voluntary action program established in R.C. Chapter 3746. R.C. 6123.01(M); *see also* R.C. 3746.01(O) (for purposes of R.C. Chapter 3746, "_[v]oluntary action_ means a series of measures that may be undertaken to identify and address potential sources of contamination of property by hazardous substances or petroleum and to establish that the property complies with applicable standards").

[3] For purposes of R.C. Chapters 6121 and 6123, the term "person" includes individuals, firms, partnerships, associations, corporations, or any combination thereof. R.C. 6121.01(C); R.C. 6123.01(B).

construction of a project to a person upon such terms as OWDA may determine or authorize). In addition, OWDA is authorized to "issue water development revenue bonds and notes of the state in such principal amount as, in the opinion of the authority, are necessary for the purpose of paying any part of the cost of one or more water development projects or parts thereof." R.C. 6121.06(A). *See generally* R.C. 6121.06-.12 (setting forth the duties of OWDA in relation to the issuance of water development revenue bonds and notes or water development revenue refunding bonds under R.C. Chapter 6121).

Thus, the General Assembly has enacted, pursuant to Ohio Const. art. VIII, §13, specific legislation enabling OWDA to issue bonds and notes and make loans and grants to governmental agencies and loans to persons for the acquisition or construction of waste water facilities, water management facilities, solid waste management facilities, and energy resource development facilities by such governmental agencies or persons. *Cf., e.g.,* Op. No. 85-011 (syllabus) ("Ohio Const. art. VIII, §13 and appropriate legislation empowering the Department of Economic and Community Development (currently the Department of Development) to expend money for the purpose of attracting the development of business and industry in the state authorize the Department to make industrial inducement grants to, and for the benefit of, private, for-profit corporations if such grants are for the acquisition, construction, enlargement, improvement or equipment of property, structures, equipment and facilities within the state for industry, commerce, distribution, and research"); Op. No. 83-094 (syllabus) ("Ohio Const. art. VIII, §13 permits the state to issue, under appropriate enabling statutes, bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement or equipment of property, structures, equipment or facilities used in farming").

"Moneys Raised by Taxation" Defined

In your first question you have asked whether the moneys OWDA derives from loan repayments are "moneys raised by taxation" for purposes of article VIII, §13 of the Ohio Constitution. As noted above, OWDA may issue revenue bonds and notes and make loans or grants to private entities under the conditions prescribed in R.C. 6121.06-.12 and article VIII, §13 of the Ohio Constitution, provided that moneys raised by taxation are not obligated or pledged for the payment of such bonds or other obligations. *See* Op. No. 85-011; *see also State ex rel. Ryan v. City Council of Gahanna,* 9 Ohio St. 3d 126, 459 N.E.2d 208 (1984) (a municipal corporation may not extend credit to a private association where the extension is financed by bonds or notes guaranteed by tax revenues of the municipality).

The phrase "moneys raised by taxation" is not specifically defined for purposes of article VIII, §13 of the Ohio Constitution. Several Ohio Supreme Court cases, however, have offered guidelines for determining what is a tax for purposes of article VIII, §13 of the Ohio Constitution.

In *Duerk v. Donahey,* 67 Ohio St. 2d 216, 423 N.E.2d 429 (1981), the court determined that moneys in the liquor control fund[4] designated for use under R.C. Chapter 166 (economic

[4] The liquor control fund, which is under the custody of the Treasurer of State, represents the

development program) were not "moneys raised by taxation."[5] In this regard, the court stated:

> Relator's arguments, which are directed toward the characterization of moneys paid into the Liquor Control Fund, are not disputed by respondent. Rather, respondent contends that all moneys required to be paid into the state treasury and used for the general expenses of government constitute taxes, regardless of their source. Consequently, respondent argues that the "excess" described in R.C. 4301.12 constitutes a tax. To this extent, we agree with respondent. [*See*] *State, ex rel. Williams,* [*v.*] *Glander* (1947) 148 Ohio St. 188; *Himebaugh* [*v.*] *Canton* (1945), 145 Ohio St. 237.
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> However, respondent further contends that R.C. Chapter 166 authorizes the use of the "excess" described in R.C. 4301.12.[6]
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> R.C. 166.06 provides that the loans at issue be secured from moneys in the Liquor Control Fund, "***as included in the definition of _pledged receipts_ in division (A)(6) of section 166.08 of the Revised Code.***"
>
> "Pledged receipts," in R.C. 166.08(A)(6), are defined as the gross profits from the state's liquor sales deposited in the Liquor Control Fund, after payment of the costs and expenses of the department, and excluding the amount payable to the state treasury under R.C. 4301.12 as the gallonage tax. R.C. 166.08(A)(6) does not

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gross profits derived from the state's liquor sales. R.C. 4301.12.

[5] Under R.C. Chapter 166, the state, through the Department of Development (formerly the Department of Economic and Community Development), is authorized to make loans, which may be secured by, *inter alia*, bonds issued from the liquor control fund, to private businesses for the acquisition or construction of facilities and other property in order to create and preserve jobs in the state and to improve the economic welfare of local areas pursuant to article VIII, §13 of the Ohio Constitution.

[6] When *Duerk v. Donahey*, 67 Ohio St. 2d 216, 423 N.E.2d 429 (1981) was decided, R.C. 4301.12 provided, in pertinent part:

> Whenever, in the judgment of the director of budget and management, the amount in the custody of the treasurer of state to the credit of the Liquor Control Fund is in excess of that needed to meet the maturing obligations of the department and as working capital for its further operations, the director of budget and management shall certify the amount of such excess to the department and to the auditor of state. The auditor of state shall thereupon issue an order on the treasurer of state as custodian of moneys collected under Chapters 4301 and 4303 of the Revised Code, for the amount thereby determined, to the general revenue fund and a pay-in order in like amount.

See 1979-1980 Ohio Laws, Part I, 1915, 2062 (Am. Sub. H.B. 204, eff. July 30, 1979).

> specifically exclude the amounts paid into the state treasury as "excess."
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> In order to accept respondent's position, R.C. 4301.12 must be construed to require that the moneys in the Liquor Control Fund are payable to the state treasury regardless of the power of the Director of Budget and Management to determine "excess," and before such determination is made. That construction is not supported by the provisions of R.C. 4301.12, and we find that R.C. Chapter 166 contemplates the use of the moneys in the Liquor Control Fund prior to a determination of "excess" under R.C. 4301.12.
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> Under R.C. 4301.12, there is no amount payable as "excess" to the state treasury before the Director of Budget and Management exercises his power to determine that an "excess" exists. Further, it is not mandatory that such determination be made under the statute. Rather, the statute provides that the amount, if any, payable to the state treasury as "excess" rests "in the judgment of the director of budget and management." In exercising that judgment, the Director of Budget and Management must first determine the amount "needed to meet the maturing obligations of the department and as working capital for its further operations."
>
> R.C. 4301.12 does not define what "obligations" are to be considered by the director in determining "excess." However, it would appear that bonds authorized under R.C. Chapter 166 are obligations to be deducted before determining the "excess" payable to the state treasury under R.C. 4301.12.

Id. at 217-19, 423 N.E.2d at 431 (footnote added). Thus, *Duerk v. Donahey* initially sets forth the general proposition of law that all moneys, regardless of their source, that are required to be paid into the state treasury and used for the general expenses of state government constitute taxes. *See Cincinnati v. Roettinger*, 105 Ohio St. 145, 153-54, 137 N.E. 6, 8 (1922) (rates and charges which are in excess of an amount sufficient to pay the cost of the operation of a municipal waterworks are classified as taxes).

However, the court's analysis in *Duerk* suggests that if moneys are not specifically designated as tax moneys by statute or are not collected pursuant to a statutory tax levy, and are not required to be paid into the state treasury for the general expenses of state government, but instead are required to be deposited into a special fund that is used only for other specifically enumerated purposes, then the moneys do not constitute "moneys raised by taxation." *Duerk v. Donahey; see Cincinnati v. Roettinger; see also State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129, 107 N.E.2d 206 (1952) (revenues derived by a municipality from on-street parking meters are not taxes if the excess moneys are used for purposes related to parking). In *State ex rel. Petroleum Underground Storage Tank Release Compensation Bd. v. Withrow*, 62 Ohio St. 3d 111, 579 N.E.2d 705 (1991), for example, the court determined that the assessments that make up the Petroleum Underground Storage Tank Financial Assurance Fund ("Assurance Fund")[7] were not "moneys raised by taxation."

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[7] R.C. 3737.91(B) and (C) authorize an annual assessment and, if necessary, supplemental assessments to pay the costs of implementing and administering R.C. 3737.90-.92 (providing for the creation and operation of the petroleum underground storage tank release compensation board and the petroleum underground storage tank financial assurance fund) and the rules adopted under them,

In determining that the assessments at issue constituted fees rather than taxes, the court reasoned as follows:

> Determining whether an assessment is a fee or a tax must be done on a case-by-case basis dependent upon the facts and circumstances surrounding each assessment.
>
> ....
>
> .... While there is no single dominant factor that mandates finding that the assessments are fees, a number of pertinent facts, taken in the aggregate, are persuasive. These are regulatory measures, enacted to deal with the environmental problems caused by leaking USTs [(underground storage tanks)]. The owners and operators of USTs are strictly liable to take corrective action and pay damages. R.C. 3737.89. These assessments are never placed in the General Fund, R.C. 3737.91(A), and they are to be used only for narrow and specific purposes, all directly related to UST problems. While the Assurance Fund plan does not possess all the attributes of an insurance program, it sufficiently resembles one in that a form of protection in return for a fee appears to exist.
>
> Our conclusion is further supported by the way the statutory plan operates. Once a year the board is required to determine the amount of the assessment to be made. If the unobligated balance in the Assurance Fund exceeds a specific dollar amount ($30 million) at the time of the determination, no UST owners are required to pay the assessment for that year. R.C. 3737.91(B). And if the Assurance Fund level falls below a specific amount ($15 million), the board has the authority to charge a supplemental assessment from each UST owner and operator. R.C. 3737.91(C). Thus, the assessment appears to function more as a fee than as a tax, because a specific charge in return for a service is involved.

Id. at 115-17, 579 N.E.2d at 708-10 (footnote omitted).

In both *State ex rel. Petroleum Underground Storage Tank Release Compensation Bd. v. Withrow* and *Duerk v. Donahey*, the court applied its case-by-case analysis to the facts and circumstances surrounding the exaction of money to determine whether the exaction was a tax. If the examination reveals that the exaction is a tax, then, pursuant to article VIII, §13 of the Ohio Constitution, the moneys derived from that exaction may not be obligated or pledged for the payment of bonds.

Loan Repayments Received by OWDA Are Not "Moneys Raised by Taxation"

With respect to your specific inquiry, an examination of the relevant factual circumstances discloses that the loan repayments received by OWDA are not the type of payments that would

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pay or reimburse a person for corrective action costs under R.C. 3737.92, compensate third parties for bodily injury or property damage under R.C. 3737.92, and pay principal and interest on revenue bonds issued under R.C. 3737.90-.948 to raise capital for the Assurance Fund.

constitute "moneys raised by taxation." Therefore, moneys derived from such loan repayments would not be prohibited from being obligated or pledged for the payment of bonds by article VIII, §13 of the Ohio Constitution. A number of factors are present that, when viewed in the aggregate, lead to this conclusion.

First, the loan repayments to OWDA are made by the borrowers under contractual obligations to make such loan repayments, rather than pursuant to statute. Accordingly, such repayments lack the normal characteristics associated with taxes. Second, the loan repayments are not required to be placed in the general revenue fund for use for the general expenses of state government, but rather are required to be paid into a specific fund to be used for OWDA purposes, as set forth in R.C. 6121.11, which is thus similar to the situation presented in both *State ex rel. Petroleum Underground Storage Tank Release Compensation Bd. v. Withrow* and *Duerk v. Donahey*. Third, although the initial funding for OWDA was provided through proceeds from tax-supported obligations issued by the State of Ohio pursuant to article VIII, §2i of the Ohio Constitution, all of the obligations of the State of Ohio that funded the original appropriation to OWDA have been paid and discharged in full, and the State of Ohio is not required to make any additional payments of tax moneys to fund the revenue bonds or notes issued by OWDA. Accordingly, under the facts and circumstances described in your letter, the loan repayments do not constitute the type of funds that the Ohio courts have deemed to be "moneys raised by taxation." If any of these factors were absent or different, then it is possible that a different conclusion would be reached, since the decisions cited above make it clear that this determination turns on a case-by-case analysis. Given this combination of factors, however, it may be concluded here that moneys derived from loan repayments received by OWDA are not "moneys raised by taxation" for purposes of Ohio Const. art. VIII, §13. Accordingly, they may be obligated or pledged for the payment of bonds or other obligations issued or guarantees made by OWDA pursuant to the provisions of R.C. Chapter 6121 or R.C. Chapter 6123, provided that the tax-supported obligations issued by the State of Ohio pursuant to article VIII, §2i of the Ohio Constitution to make the initial loans have been paid and discharged in full.

Loan Repayments Received by OWDA May Be Used to Make Loans

Your second question asks, if the moneys OWDA derives from loan repayments constitute "moneys raised by taxation," does the use of these loan moneys to make loans cause the moneys to be obligated for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted pursuant to Ohio Const. art. VIII, §13. Because the loan repayments are not deemed "moneys raised by taxation," the prohibition of Ohio Const. art. VIII, §13 does not preclude OWDA from making loans with those moneys for the specific purposes therein enumerated. Accordingly, OWDA is authorized, pursuant to Ohio Const. art. VIII, §13 and appropriate enabling legislation, to make loans to persons for the acquisition, construction, enlargement, improvement, or equipment of property, structures, equipment and facilities within the state for industry, commerce, distribution, and research. *See* Op. No. 85-011.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that moneys derived from loan repayments received by the Ohio Water Development Authority are not "moneys raised by taxation" for purposes of Ohio Const. art. VIII, §13 and, accordingly, may be obligated or pledged for the payment of bonds or other obligations issued or guarantees made by the Ohio Water Development Authority pursuant to the provisions of R.C. Chapter 6121 or R.C. Chapter 6123, provided that the tax-supported obligations issued by the State of Ohio pursuant to article VIII, §2i of the Ohio Constitution to make the initial loans have been paid and discharged in full.

Respectfully,

LEE FISHER
Attorney General

October 14, 1994

Steven J. Grossman, Executive Director
Ohio Water Development Authority
Suite 1425 Le Veque Tower
50 West Broad Street
Columbus, Ohio 43215

SYLLABUS: 94-071

Moneys derived from loan repayments received by the Ohio Water Development Authority are not "moneys raised by taxation" for purposes of Ohio Const. art. VIII, §13 and, accordingly, may be obligated or pledged for the payment of bonds or other obligations issued or guarantees made by the Ohio Water Development Authority pursuant to the provisions of R.C. Chapter 6121 or R.C. Chapter 6123, provided that the tax-supported obligations issued by the State of Ohio pursuant to article VIII, §2i of the Ohio Constitution to make the initial loans have been paid and discharged in full.